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In the Supreme Court of the United States

OCTOBER TERM, 1960

FRED CODUTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, JR.,
Assistant Attorney General,
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys,
Department of Justice,
Washington 25, D. C.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. II, pp. 35-43) is reported at 284 F. 2d 464.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1960 (Pet. App. III, p. 45). A petition for rehearing was denied on January 17, 1961. The petition for a writ of certiorari was filed on February 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's request for a transcript of testimony of a witness before a grand jury was properly denied.

2. Whether newspaper articles published prior to the actual commencement of testimony required the declaration of a mistrial.

3. Whether petitioner was accorded a fair trial.

4. Whether petitioner's sentence is reviewable as excessive.

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the Seventh Circuit affirming the judgment of the District Court for the Northern District of Illinois. The district court, upon the verdict of a jury, had adjudged petitioner guilty of narcotics offenses on August 18 and 20, 1958, and of conspiracy, from August 8 to August 20, 1958, to commit these and other narcotics offenses (R. 20-23, 25-27).[1] Petitioner was fined $20,000, and sentenced to 20 years' imprisonment on each of counts 5 and 7, the sentences to run consecutively, with concurrent sentences of 20 years on the other three counts in which he was named (R. 25-27).

The testimony for the government, disclosing petitioner's association with Frye, Baker, and the informer McNeal, and petitioner's direct participation in the sale of narcotics to McNeal, was given by McNeal and by law enforcement officers who observed some of McNeal's telephone conversations and meetings. Fluorescent powder was found on petitioner after his arrest,

[1] "R." refers to the "Appendix for Defendants-Appellants" in the court of appeals.

such powder having been placed on currency supplied McNeal for payment for the narcotics (R. 130-131, 183, 197-198, 203-204, 226-227). Three officers testified to petitioner's flight when they sought to arrest him at his home (*e.g.*, R. 201-202, 208-209).

Particular matters relating to contentions made by petitioner are discussed in the Argument.

ARGUMENT

The judgment below is a correct application of established principles to a particular factual situation, and no conflict of decisions is involved. Review by this Court is therefore unwarranted.

1. During McNeal's testimony, petitioner asked whether the government had taken any statements from McNeal. Government counsel stated that the witness had testified before the grand jury. Without requesting the trial judge to examine the grand jury minutes first, defense counsel thereupon asked for the production of those minutes, stating that it was a matter of discretion "where it appears that a miscarriage may result," and that a miscarriage of justice "could come from a disreputable witness such as this" (R. 97). The motion to turn over the minutes was denied (R. 98).

Since counsel made no request that the court examine the grand jury minutes, the present case is governed by this Court's decision in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 401. Petitioner was not entitled to the grand jury minutes as a matter of right, and he showed no "particularized need" for the minutes. The fact that McNeal had a criminal record and was an informer might well have supported the

epithet "disreputable," but petitioner pointed to nothing in McNeal's testimony which would have indicated to the trial judge that McNeal's testimony before the grand jury was different from his later testimony at the trial.[2]

Since petitioner did not request an examination of grand jury testimony by the judge, the decisions as to which he asserts a conflict (Pet. 8-12) are inapposite, for they relate to a trial judge's duty to act on a specific request that the judge himself examine the minutes. Absent such a request, that issue is not presented on review. *Pittsburgh Plate Glass Co. v. United States, supra*, 360 U.S. at 401.

2. After a jury had been selected, but before any testimony had been adduced, petitioner made a motion for a new trial and for postponement of the case to a future time because of radio broadcasts and newspaper articles relating to the case (R. 51-53). The

[2] The correction of an "untruth," to which petitioner now adverts in the petition (Pet. 6-7), was merely a matter of government counsel, in chambers, correcting an apparent incorrect statement by McNeal denying that he had spoken with government counsel prior to taking the stand. McNeal's denial did not relate to anything that he could have stated inconsistently before the grand jury since the talks patently were those occurring after the grand jury proceedings (R. 104-105). Moreover, the witness' misunderstanding was later clarified as an assumption that he had only been asked whether anyone told him "how to testify" (R. 107). In any event, the incident occurred *after* the request for the grand jury testimony and was not before the judge at the time of the ruling, or raised again after its occurrence.

Similarly, the testimony at R. 101-102, sought to be relied upon by petitioner (Pet. 12) shows, not inconsistency, but consistency, between McNeal's testimony at the trial and before the grand jury: "Today is not the first time that I have ever mentioned that I saw a car pull up in front of the Oldsmobile * * *. The first time that I mentioned it was in front of the Grand Jury" (R. 102).

articles quoted referred to the selection of the jury, named the defendants on trial, and summarized the charges. The one in the Tribune referred to the fact that petitioner was reputed to be a "key figure" in the narcotics traffic and that he was under suspension from his job as a truck loader for the Sanitation Department. The article in the American referred to the reputation of petitioner as "Mr. Big" and to the fact that his trade was said to be a million dollar a year business. The district court denied petitioner's motion (R. 53).

To a major extent, the articles were factual and colorless. To the extent that they contained information not in the charge, they told the jury nothing that was not implicit in the evidence that was bound to be produced before the jury. Although the evidence at trial did not purport to indicate the full extent of petitioner's narcotics traffic, the evidence did show that petitioner dealt in $4700 worth of narcotics with one person in a 10 day period, and that he was the source of supply for the others (R. 64, 71; see Pet. App. II, p. 39). Thus in contrast to *Marshall* v. *United States*, 360 U.S. 310, and the other cases on which petitioner relies,[3] the articles here did not contain information which would have prejudiced petifioner.

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[3] Petitioner's citation of allegedly conflicting decisions in the Sixth Circuit (*Marson* v. *United States*, 203 F. 2d 904, and *Briggs* v. *United States*, 221 F. 2d 636), is misconceived. In *Marson*, the newspaper referred to long police records (203 F. 2d at 909) and in *Briggs* to an expression of the judge strongly suggesting that testimony for the defendant was the result of improper conduct (221 F. 2d at 639).

Moreover, there was no showing that any juror ever read or was acquainted with the articles; nor did counsel ask for any interrogation of the jurors on the subject (Pet. App. II, p. 41).

Finally, at the conclusion of the trial, in the introduction to his instructions, the trial judge told the jury that at "the beginning of this trial, and from time to time during the course of the trial, I have instructed you to refrain from discussing this case, from permitting anyone to discuss it with you, from reading anything that might be said in the newspapers concerning it, and from listening to anything that might be said over the radio or television concerning it. I assume that you have obeyed these instructions" (R. 339). He further specifically told the jury that they were to decide the case only on the evidence received in court under the instructions of the court and that, if they had heard or observed anything else, it was to be wholly disregarded (R. 339). Under all these circumstances, as the court of appeals below held, the denial of the motion for a mistrial was well within the area of the trial judge's discretion (Pet. App. II, p. 41).

3. Petitioner seeks to cumulate an alleged "combination of errors" as depriving him of a fair trial (Pet. 2). The matters relied upon, however, are exercises of conceded discretion by the trial judge and, in the context of the entire record, involve no abuse of discretion.

(a) The trial judge properly permitted cross-examination of petitioner as to his financial resources. In the face of testimony that petitioner was the head man

of an operation in narcotics transactions with one customer, amounting to $4700 in a 10 day period (R. 64, 71), petitioner had taken the stand and testified that he was a loader on a city garbage truck (R. 297). This, and his other testimony indicating very modest circumstances, would, absent impeachment, indicate inability to finance the size of the operations attested to by the government witnesses. It was, accordingly, pertinent and proper to cross-examine with respect to petitioner's other dealings in large sums, irrespective of whether the jury might draw inferences unfavorable to him from his attempted explanations that thousands of dollars had come to him from unspecified wagers (R. 307-308), from "life savings" (R. 309), and from his father before his death (R. 319), and that large sums exchanged at a bank were from someone else (R. 310-311). See *United States* v. *Lawinski*, 195 F. 2d 1, 7 (C.A. 7); *United States* v. *Jackskion*, 102 F. 2d 683, 684, certiorari denied, 307 U.S. 635.

(b) Contending that the trial judge displayed antagonism toward him (Pet. 19), petitioner combs four incidents from the record of this extended trial. The first was a mere inquiry by the judge as to whether petitioner's cross-examination of a witness had not been gone over before. The record here indicates that petitioner's questioning was repetitious and extremely detailed (R. 110-111), but that, after the judge's attempt to expedite the proceeding, petitioner was permitted to go on, in his own pace and detail, without further suggestion as to his manner of cross-examination (R. 111-114).

A second incident arose out of petitioner's effort to

seize upon a witness' answer that he saw the driver of a car but was not able to "identify" him "at that time" (R. 119-120). Petitioner sought to "object" to the witness' later testimony that he saw the same driver on a later date, and the trial judge merely pointed out that the witness "knew who it was. * * * He saw him but he could not identify him until later" (R. 132-133). The observation was a temperate ruling on an effort of petitioner to inject argument into the middle of testimony. It was further clarified to the jury by a specific caution, shortly thereafter, that remarks of the judge to counsel were not to be taken by the jury to affect their weighing of the evidence (R. 141).

Petitioner complains, further, that the trial judge read documents at times during the testimony of defense witnesses. The judge assured petitioner that he had heard the testimony fully and, at a later time, pointed out that he was merely selecting the jury instructions in the interest of saving time (R. 298-299, 305). Moreover, the judge instructed the jury fully that he had not intended, at any time during the trial, to express any opinion on any matter of fact, and that, if there had been any such expression, the jury was to disregard it (R. 340).

Lastly, petitioner complains of the fact that, upon denial of his motion for a new trial, the trial judge had been prepared in advance with a written opinion. The complaint is fully answered by the statement of the judge, "I had two statements prepared, one to set the verdict aside, which didn't justify itself, and the other one." (R. 359).

(c) Petitioner now complains of the failure to give several requested instructions (Pet. 22-27), but he

failed to make objection, as required under Rule 30, F.R. Crim. P., when the instructions, sometimes in different form, were given to the jury (R. 356) and there would still have been time to make clarifications, if such had actually been required. With respect to petitioner's flight when law officers sought to arrest him, the court gave full instruction (R. 353-354). There was no need for further instructions as to petitioner's self-serving testimony that he had thought the officers to be robbers, especially in the face of the conceded fact that he had not reported the incident to the police, although his route was within three blocks of a police station, but had remained away from his home and came to the police for the first time with his lawyer and bondsman (R. 313-314).

(d) Petitioner complains (Pet. 24-26)—again without seasonable objection made under Rule 30, F.R. Crim. P.—of the failure of the court to give a separate instruction as to a possible alibi. Petitioner alone testified to being elsewhere at the time of the narcotics transactions and, except for his general denials of guilt, his statements as to being elsewhere were unprecise as to the time elements and did not preclude brief, undetectable excursions to the various meeting places (*e.g.*, R. 300). Upon the record, an instruction as to alibi was not necessary and might well have been confusing.

(e) Similarly without seasonable objection under Rule 30, F.R. Crim. P., petitioner now complains of failure to give a special instruction tendered earlier regarding an informer's testimony (Pet. 27). The complaint is answered by the instructions that were given on expectation of reward for testimony (R. 343)

and on credibility and impeachment of witnesses (R. 340-341, 343).

4. Petitioner would have this Court review his sentence as excessive (Pet. 28). Federal appellate courts are without such power of review where the sentence is within the statutory limits. See *Gore* v. *United States*, 357 U.S. 386, 393; *Brown* v. *United States*, 359 U.S. 41, 52; *Smith* v. *United States*, 273 F. 2d 462, 467-468 (C.A. 10), certiorari denied, 363 U.S. 846.

In the present case, sentences on all counts were concurrent sentences of 20 years, except that the sentence on count 7, relating to the sale of 3687 grains of heroin on August 20, 1958, was made consecutive to that relating to sale of 386 grains on August 18, 1958. The trial judge, adverting to the clear inclination of Congress toward severity as to narcotics offenses (R. 23), could not have been unimpressed by sales of more than $4,700 of narcotics to a single buyer within ten days.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

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